COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

SHAWN C. CARTER, S. CARTER ENTERPRISES, MARCY MEDIA HOLDINGS, LLC and MARCY MEDIA, LLC, Petitioners, v. ICONIX BRAND GROUP, INC. and ICON DE HOLDINGS, LLC, Respondents.	Index No.: 655894/2018 Commercial Division Part 61 Motion Seq. No. 4

MEMORANDUM OF LAW IN SUPPORT OF
RESPONDENTS' ORDER TO SHOW CAUSE FOR SUMMARY JUDGMENT

521949.00671/115814983v.4

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

Respondents Iconix Brand Group, Inc. ("Iconix") and Icon DE Holdings, LLC ("Icon DE") (collectively, "Iconix") respectfully submit this Memorandum of Law in Support of Iconix's Motion for Summary Judgment, pursuant to CPLR 409(b) and CPLR 3212 (the "Motion").

PRELIMINARY STATEMENT

Iconix commenced an October 1, 2018 arbitration against Shawn C. Carter, S. Carter Enterprises, Marcy Media Holdings, LLC, and Marcy Media, LLC (collectively, the "Carter Parties") before the American Arbitration Association (the "AAA") to enforce a financial records production clause in a 2015 settlement agreement arising from a prior dispute among the parties (the "Arbitration"). Faced with no realistic opposition to Iconix's claim in the Arbitration, and believing that Iconix's financial condition is desperate enough that delay substitutes as a defense, the Carter Parties fundamentally challenge the nationwide alternative dispute resolution infrastructure in this vexatious lawsuit that serves only as a means of delay.

The Carter Parties' procedural posturing amounts to an unprecedented request to avoid a private, voluntary, and unambiguous arbitration clause (routinely enforced as a matter of public policy) masquerading as a crusade to create further diversity.

Conveniently, Mr. Carter, also known as "Jay-Z," omits from his Petition that he is and has been a serial AAA litigant (and other arbitral bodies) with demographically similar (or identical) arbitration candidate pools without raising the arbitrator race objections rendered by the Carter Parties in this special proceeding. The sudden Carter Parties' epiphany exposes the charade.

Contrary to the Carter Parties' tale of "token" representation, the "Strike List" of AAA-presented arbitrators at the time of filing was composed of 25% (3 of 12) African American candidates, selected from a National Roster consisting of at least 150 African American arbitrators. The Carter Parties voluntarily waived participation in nominating any additional candidates by ignoring AAA deadlines and self-imposing arbitrary standards of "qualification."

When parties voluntarily agree to privately arbitrate, they waive a variety of protections and rights in exchange for the expedience, privacy, and (often) lower costs of arbitration. Within the framework of this private adjudication of rights, no federal or New York statute or rule entitles the contracting party to select from arbitrators "representative" of society at large as discerned in the unilateral discretion of the contracting party. Instead, parties are free to contractually limit arbitrator selection procedures, as the parties elected in the Arbitration. The Court's role in such an instance is limited to enforcing those contracts as written – not interfering with the contractually-ceded arbitrator selection process. Of crucial importance, any objections based on arbitrator bias can be raised, by statute and practice, after completion of the Arbitration. The dubious, indeed offensive, insinuation by the Carter Parties that the race of an arbitrator is inherently indicative of bias contravenes every published authority on the matter.

The Carter Parties cannot, prevail on the merits of their dubious claim because they: (i) have and continue to materially participate in the Arbitration, waiving the right to seek a stay; (ii) allowed the AAA deadline for nominating an arbitrator to expire; (iii) ask the Court to set impermissible conditions on the Arbitration and its neutral candidate pool, outside of the Court's authority; and (iv) invoke extra-contractual arbitrator selection procedures outside of the AAA rules.

Moreover, the Carter Parties' reliance on the Equal Protection Clause of the New York Constitution and New York State and New York City human rights statutes are equally unavailing because: administration of an arbitration is not "state action," and the AAA is not a place of public accommodation.

The Carter Parties' vision of a paternalist Court undertaking an *ad hoc* review of arbitrator pools based upon demographic profiles would open a veritable floodgate of litigation around the country, undermining bargained-for rights to expeditious dispute resolution.

Justice Scarpulla observed at the November 30, 2018 TRO hearing that the Carter Parties failed to meet their burden of proof on each of the elements for a preliminary injunction, but reserved to this Court the hearing on the Carter Parties' injunctive relief. Despite Justice Saliann Scarpulla's derogation of the Petition's legal claims, the Carter Parties maintained their requests for relief, forcing Iconix to expend resources opposing the Petition.

After Iconix filed its Opposition, but prior to the hearing, the Carter Parties withdrew their Order to Show Cause and all requests for relief while maintaining the pendency of the underlying Petition. Subsequently, the Carter Parties have continued to participate in the Arbitration while maintaining the Petition as a means of hedging unfavorable results in the arbitrator selection process. Not only is such forum hedging a violation of New York law, but it has also forced Iconix to expend further resources drafting this Motion to dismiss the Carter Parties' erroneous claims.

Increasing diversity throughout the legal profession, including in private arbitral bodies, is an important goal which the American Bar – and society – have continually strived to achieve, and which Iconix wholly supports. Blank Rome LLP and other legal service providers are proud to be at the forefront of these initiatives. Unfortunately, the Carter Parties have shamelessly co-opted

these ideals to delay a commercial dispute to which they voluntarily submitted by contract. In so doing, the Carter Parties demean the very virtues they purport to champion.

STATEMENT OF FACTS

The undisputed material facts are set forth in Iconix' Rule 19-a Statement of Facts ("SOF") which is incorporated by reference in this memorandum.

LEGAL ARGUMENT

In a special proceeding, "the court shall make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised." CPLR 409(b). The same standards and rules of decision that apply to a motion for summary judgment in a non-special proceeding apply to a motion for summary judgment in a special proceeding. New 110 Cipriani Units, LLC v. Board of Managers of 110 E. 42nd Street Condominium, 166 A.D.3d 550, 550 (1st Dep't 2018) ("The court having determined that plaintiff's claims fell within the ambit of the arbitration agreement and that plaintiff was not entitled to a stay of the arbitration, the CPLR 7503(b) special proceeding was disposed of…"); Gonzalez v. City of New York, 127 A.D.3d 632, 633 (1st Dep't 2015).

A court may grant summary judgment where the moving party shows that there are no "material issues of fact." CPLR 3212(b); Brill v. City of New York, 781 N.Y.S.2d 261, 263 (2004).

POINT I.

THE CLAIMS FOR RELIEF HAVE BEEN WITHDRAWN, NO JUSTICIABLE CONTROVERSY EXISTS AND THE PETITION IS MOOT

It is well-established law that New York State's case or controversy doctrine "forbids courts to pass on academic, hypothetical, moot, or otherwise abstract questions." Hearst Corp. v. Clyne, 50 N.Y.2d 707, 713 (1980). Courts do not issue judicial decisions which "can have no

immediate effect and may never resolve anything." New York Public Interest Research Grp., Inc. v. Carey, 42 N.Y.2d 527, 531 (1977). A claim may become moot, and consequently outside the scope of the court's purview, if through the 'passage of time or a change in circumstance' the rights of the parties will no longer be affected by a determination of the court. City of New York v. Maul, 14 N.Y.3d 499, 507 (2010).

The Petition demands a: (i) temporary restraining order, (ii) preliminary injunction, and (iii) permanent injunction, each predicate supporting the Carter Parties request to stay the Arbitration. (Petition, Dkt. 1, *passim*) The Carter Parties subsequently withdrew all forms of injunctive relief, rendering the balance of the Petition moot. (Notice of Withdrawal, Dkt. 48; Dec. 9, 2018 Spiro Lttr., Flanders Affirm. Ex 22 ["request[ing] that the Court lift the temporary stay of arbitration," and declared "[the Carter Parties] have withdrawn their motion for a **preliminary and permanent** injunction."]) Therefore, no claim for relief is pending before the Court, and any decision arising from the Petition would effectively be an advisory opinion prohibited by New York law. Cuomo v. Long Island Lighting Co., 71 N.Y.2d 349, 354 (1988) ("The Courts of New York do not issue advisory opinions for the fundamental reason that in this state the giving of such opinions is not the exercise of the judicial function."). At this stage, any Court decision will have no practical effect on the parties, rendering the Petition of no moment, and subject to summary dismissal. Maul, 14 N.Y.3d at 507.

POINT II.

EVEN IF THE CLAIMS ARE NOT MOOT, THE COURT LACKS AUTHORITY TO OTHERWISE ADJUDICATE THE PETITION AT THIS STAGE

A. The Carter Parties Waived Their Rights to Stay the Arbitration by "Participating" in the Arbitration

1. The Carter Parties' Participated in the Arbitration Prior to Filing the Petition

The Carter Parties seek an arbitration stay pursuant to CPLR § 7503, a statutory remedy exclusively available to *"a party who has not participated in the arbitration."* CPLR § 7503(b) (emphasis added) "Participation" within the meaning of CPLR § 7503(b) includes participating in the selection process and engaging in administrative conferences. Matter of JJF Assoc., LLC v. Joyce, 59 A.D.3d 296, 297 (1st Dep't. 2009) (party participated by "attending a pre-hearing conference with the selected arbitrator, at which a hearing schedule and ground rules were decided upon"); Mark Ross & Co., Inc. v. XE Capital Mgt., LLC, 46 A.D.3d 296, 297 (1st Dep't 2007) ("participated in the preliminary stages of the arbitration for approximately seven months without objection"); Morfopoulos v. Lundquist, 191 A.D.2d 197, 198 (1st Dep't 1993) (participation by "submitting a notice of appearance in the arbitration, participating in the selection of the arbitrator, agreeing to the tribunal's suggestion that the issue of arbitrability be determined by the arbitrator selected…"); see also Kidder, Peabody & Co. v. Marvin, 161 Misc. 2d 12, 16 (Sup. Ct. N.Y. Cty. 1994) ("Clear cases of participation in arbitration are presented when a party engages in the selection of the arbitrators.").[1]

The Carter Parties conceded at the TRO Hearing that they "*proceed[ed] through the selection process in arbitration as we commonly do*." (Tr. at 5, January 11, 2019 Affirmation of

[1] Further, CPLR § 7503(c) categorically bars a motion to stay made after 20 days of the mere service of special notice. This time period would, in the clear majority of cases, expire before an arbitrator is selected, denoting legislative intent to mandate that stay motions be made prior to the selection of arbitrators.

Craig M. Flanders ("Flanders Affirm.") Ex. 14) Specifically, the Carter Parties appeared and participated in the Arbitration by: (i) appearing at the Initial Conference; (ii) stipulating to reduce the number of arbitrators on this matter from three arbitrators to a single arbitrator; (iii) submitting a position regarding the need for mediation; (iv) opining on the anticipated length of a potential hearing; (v) submitting arguments on the parties' respective obligations to remit administrative fees; (vi) participating in the negotiation of arbitrator selection; (vii) attending a separate meet-and-confer on arbitration candidates; (viii) submitting a general denial by allowing the response time to expire; and (ix) engaging extensively with the AAA case manager regarding arbitrator candidates. (Flanders Affirm. ¶¶ 9, 12-13, Ex. 5) All the foregoing was done without the Carter Parties reserving any rights or moving for a stay. Id. at ¶ 9.

The Arbitration was ongoing for two months before the Carter Parties moved for a stay, allowing them to "participate" in the Arbitration within the meaning of CPLR § 7503(b) prior to filing their petition. The Carter Parties therefore waived the right to move for a stay. Morfopoulos, 191 A.D.2d at 197. Dismissal of the Petition is warranted on these grounds alone.

2. The Carter Parties Participated in the Arbitration After Filing the Petition

Paradoxically, the Carter Parties continued to participate in the Arbitration voluntarily even after the filing their Petition. (Flanders Affirm. ¶ 41) It is self-evident that the Carter Parties can "not actively engage in the arbitration proceedings and simultaneously retain their right to seek subsequent judicial intervention pursuant to CPLR 7503(b), as such 'forum-hedging' is incompatible with the legislative policy underlying CPLR 7503(b)." Stone v. Noble Constr. Mgmt., Inc., 116 A.D.3d 838, 839 (2d Dep't 2014). The waiver is particularly manifest where, as here, a party "proceeds to the arbitration without seeking temporary judicial relief pending the determination" of a special proceeding for stay. Commerce & Indus. Ins. Co. v. Nester, 90 N.Y.2d

255, 264 (1997) (Courts do not "encourage such unilateral advantage and forum-hedging would undermine arbitration principles and policies.").

Having withdrawn their Order to Show Cause and request for injunctive relief, (Notice of Withdrawal, Dkt. 48; Dec. 9, 2018 Spiro Lttr., Flanders Affirm., Ex 22 ["request[ing] that the Court lift the temporary stay of arbitration," and declared "[the Carter Parties] have withdrawn their motion for a **preliminary and permanent** injunction."]), the Carter Parties elected to participate in the arbitration process while foregoing injunctive relief during pendency of the Petition. Id. The Carter Parties instead announced an intent to "engage in an arbitrator selection process that complies with New York public policy" within the context of the Arbitration proceeding. (Dec. 9, 2018 Spiro Lttr., Flanders Affirm. Ex 22) Since withdrawing the request for injunctive relief, the Carter Parties have actively participated in additional AAA conferences and submitted a letter brief regarding arbitrator selection. (SOF ¶ 44)

The Carter Parties' continued participation in the Arbitration constitutes a waiver of their right to seek subsequent judicial intervention. Nester, 90 N.Y.2d at 255. Consequently, the Court must dismiss the Petition in its entirety with prejudice.

B. Allowing the Carter Parties to Maintain the Petition Would Exceed the Limited Power Afforded to the Court to Intervene in an Arbitration at this Stage

As the Court of Appeals has repeatedly stated, "arbitration is a creature of contract, and it has long been the policy of this State to interfere as little as possible with the freedom of consenting parties in structuring their arbitration relationship … [t]he court's role is limited to interpretation and enforcement of the terms agreed to by the parties." Brady v. Williams Capital Group, L.P., 14 N.Y.3d 459, 465 (2010) (internal citations omitted).

CPLR § 7503(b) provides that a party may stay an arbitration, not impose conditions (i.e., adding external arbitrator names) on the arbitration administration. CPLR § 7503. While the Court

has the authority to review an arbitration award on limited grounds, including the "partiality of an arbitrator appointed as a neutral," the time for challenging an arbitration on these grounds is *after* the arbitration is completed, and the final award is rendered. CPLR § 7511(b)(2); Sablosky v. Edward S. Gordon Co., 73 N.Y.2d 133, 139 (1989) (citing CPLR §§ 7506, 7511 holding "Plaintiff's remaining claim, alleging that the arbitration panel may be biased, is premature"). Indeed, vacatur based upon bias is limited only to those circumstances where: (i) the "rights of a party have been prejudiced" by the arbitrator; who is (ii) actually "appointed." CPLR § 7511(b)(2). These circumstances necessarily cannot occur before the case is fully adjudicated or an arbitrator selected. CPLR § 7511(b)(2).[2]

At this stage, the Court must merely interpret the contract guided by "the strong public policy of encouraging, by judicial noninterference, an unfettered, voluntary arbitration system, where equity should be done." Neirs-Folkes, Inc. v. Drake Ins. Co., 75 A.D.2d 787, 788 (1st Dep't 1980); see also Avon Prods., Inc. v. Solow, 150 A.D.2d 236, 239 (1st Dep't 1989) (non-final rulings not subject to review).

The parties Master Settlement Agreement ("MSA"), requires arbitration and "the parties control the scope of arbitration, the authority and selection of arbitrators, the choice of law, every aspect of the arbitration." Brady v. Williams Capital Group, L.P., 64 A.D.3d 127, 132 (1st Dep't 2009). "A court may not, in the guise of interpreting a contract, add or excise terms or distort the meaning of those used to make a new contract for the parties." Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P., 60 A.D.3d 61, 66 (1st Dep't 2008).

[2] Even then, the "mere inference of impartiality" is insufficient to establish bias. Rose v. J.J. Lowrey & Co., 181 A.D.2d 418, 419 (1st Dep't 1992). Race is a patently insufficient indicator of bias, particularly in a commercial case. Redd v Battisti, 94 A.D.3d 676, 677 (1st Dep't 2012).

Here, the Carter Parties contractually agreed "[t]he arbitration shall be administered by the American Arbitration Association" according to the "Commercial Arbitration Rules." (MSA 9.8(e), (f), Flanders Affirm. Ex. 1). While the MSA addresses the number of arbitrators, there are no specific procedures or parameters for selecting an arbitrator other than incorporating the AAA's selection procedures. Id. The Carter Parties seek to use the threat of litigation to coerce the AAA to engage in a process entirely outside of AAA rules and mandate racial criteria on arbitrator selection not provided for in the MSA. (Petition p. 12, Dkt. 1)

But this abuse of the judicial system finds no legal basis. First, the Carter Parties fail to name the AAA as a party in this lawsuit, restricting the Court's ability to direct the AAA to take any affirmative action. See CPLR § 6301 (authorizing injunction only where "the defendant threatens or is about to do" an act); Atl. Beach v Pebble Cove Homeowners' Ass'n., 139 A.D.2d 627, 627-628 (2d Dep't. 1988) (denying equitable relief for failure to name necessary party where injunction would "directly affect the substantial rights" of such parties). The AAA, for its part, has already indicated that the Carter Parties requested relief is not feasible. (Zaino Lttr, Flanders Affirm. Ex. 3 [Resp. to Cl. Req. 4] [AAA "review process makes it impractical to add individuals to the Roster solely for the purpose of considering them on a particular case." noting inevitable "conflicts would arise"]) Even if the AAA was a party, the Court cannot adopt an administrative role in the AAA arbitrator selection process or rule on a non-final determination of the AAA. Avon Prods., Inc., 150 A.D.2d at 239.

Similarly, the Carter Parties' seek to impose upon the an AAA arbitrary selection practice, requiring the Court to graft new terms into the MSA in contravention of established precedent. See, e.g., Salvano v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 85 N.Y.2d 173, 182 (1995) (court's role interpreting arbitration clauses "does not include the rewriting of their contract and

the imposition of additional terms … To read into the [arbitration] Rules a provision authorizing compulsory expedited arbitration would be to fundamentally modify the terms of the parties' contract and force respondent to arbitrate in a manner contrary to the agreement to which it has assented").

In addition, the Carter Parties' collateral attack on the racial demographics of the AAA National Roster, at best, amounts to a premature bias challenge based on speculation that the Carter Parties will not receive fair arbitral treatment because of speculative racial bias, which as a matter of law cannot be adjudicated by the Court at this stage. CPLR §§ 7506, 7511. CPLR § 7511 affords the Carter Parties a distinct statutory remedy if the Carter Parties believe an arbitration award was derived by bias; a remedy which on its face precludes any finding of irreparable harm.

C. The Carter Parties Waived the Right to Select Arbitrators Outside of the AAA National Roster by Voluntarily Entering a Contract Which Selected the AAA

The Carter Parties neglect to cite a single case in any jurisdiction which has afforded arbitration stay relief on the grounds proffered here (i.e., the diversity of an arbitrator pool). But in 2000, the Seventh Circuit Court of Appeals rejected a virtually identical claim to the Carter Parties' claim in what appears to be the only published authority in the country which has tested such a theory. In Smith v. American Arbitration Ass'n, 233 F.3d 502 (7th Cir. 2000), a female party to a commercial AAA dispute sought an injunction against the AAA selection procedures after receiving 14/15 arbitrator choices that were male, and where the adverse party struck the only female candidate. Id. at 504. The litigant similarly raised equal protection violations, unfair trade practice, and human rights claims. Id. Rejecting the injunction, and dismissing each of these predicates, Justice Richard A. Posner explained:

> *The choice of arbitration is a choice to trade off certain procedural safeguards, such as appellate review, against hoped-for savings in time and expense (other than the expense of the tribunal), a measure of procedural simplicity and informality, and a differently constituted tribunal.*

Id. at 506.

Similarly, New York courts have repeatedly recognized that a party which agrees to arbitration "*waives in large part many of his normal rights under the procedural and substantive law of the State*." Harriman Group v. Napolitano, 213 A.D.2d 159, 163 (1st Dep't 1995), quoting Marlene Indus. Corp. v. Carnac Textiles, Inc., 45 N.Y.2d 327, 334 (1978). The Carter Parties assert a host of rights to select arbitrators that: "reflect their backgrounds and life experiences," "reflects the diverse population" and "who are qualified to preside over complex commercial cases" based upon the Carter Parties' subject determination of qualifications. (Br. pp. 11, Dkt. 10; Petition ¶ 7, Dkt. 1) From where do these alleged rights derive?

The Carter Parties loosely reference the standards applicable to striking jurors in litigation. (Br. p. 11, Dkt. 10) But "*the analogy is weak because jurors are drafted and arbitrators are volunteers*." Smith, 233 F.3d at 505. The right to impose jury-selection-type standards on arbitration tribunals is precisely one of the package of rights that a party voluntarily waives by adopting the AAA rules. McMahan & Co. v. Dunn Newfund I, Ltd., 230 A.D.2d 1, 4 (1st Dep't 1997) ("Due process in arbitration means satisfying 'minimal requirements of fairness,'" which is "not to be equated with the full panoply of judicial procedural safeguards of a regular litigant").

Here, the Carter Parties' grievance of being deprived of a "meaningful choice" from the National Roster is all the more meritless because they failed to contractually bargain for *any* participation in the National Roster selection process. The MSA adopts the AAA Commercial Rules for arbitrator selection. (MSA 9.8, Flanders Affirm. Ex. 1) Under these Rules, the default selection process in multi-party cases provides "*unless the parties agree otherwise, when there are two or more claimants or two or more respondents, the AAA may appoint all the arbitrators*." (AAA Commercial Rules R-12(c), Flanders Affirm. Ex. 13)

The Rules also contemplate that the AAA will select the arbitrator in those instances in which a party-nominated arbitrator is not available or in the AAA's 'Large Complex Cases,' where the parties cannot agree to a selection method. Id. at R-4(c), L-2(c). Even in single-party cases, the default rule provides that the AAA will generate a Strike List without any National Roster review by the parties. Id. at R-12(a)-(b). Under the MSA, the parties have no inherent right to review the National Roster, let alone insist on parameters for National Roster candidates. The parties waived the right to insist on such parameters by agreeing to arbitration, therefore removing the controversy from the purview of this Court or the full panoply of its procedural safeguards. Harriman Group, 213 A.D.2d at 163.

POINT III.

EVEN IF THE MERITS OF THE CLAIMS COULD BE CONSIDERED, THE ARBITRATION AGREEMENT IS NOT VOIDABLE ON PUBLIC POLICY GROUNDS

An application to stay arbitration may be granted "on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred by [a limitation of time]" CPLR 7503(b). The Carter Parties attack the applicable arbitration agreements here solely on the grounds of public policy. (Petition at ¶ 1, Dkt. 1) A petitioner has the burden of showing sufficient facts to establish the justification for the stay. In re SSL Intl., PLC v Zook, 44 A.D.3d 429-430 (2007).

A. The AAA Website's Representations on Diversity are Patently Irrelevant

The Carter Parties disingenuously claim "misrepresentations by the AAA, to the detriment of the Carter Parties, render the arbitration clause as applied in these circumstances a violation of New York law, and void as against public policy." (Br. at p. 12, Dkt. 10) The only evidence proffered of 'representations' allegedly relied upon by the Carter Parties were made as of November 28, 2018 when the Carter Parties reviewed the AAA website, well over three years after

the MSA was executed. The Carter Parties fail to explain any causal relationship between the contract they seek to invalidate on public policy grounds and representations by a third party rendered more than three years *after* it was executed.[3]

If the Carter Parties maintain they were harmed by AAA website misrepresentations on diversity, their remedy is to file a claim against the AAA under New York's General Business Law seeking damages and/or equitable relief. See N.Y. Gen. Bus. Law § 349(h). The Carter Parties failed to name the AAA as a party to these proceedings, depriving the Court of jurisdiction to enforce the relief sought by the Carter Parties. Atl. Beach, 139 A.D.2d at 627-628. Certainly, no authority is provided for reliance on a third-party GBL § 349 violation to invalidate an arbitration clause on public policy grounds.

B. Equal Protection and Human Rights Statutes Have No Application

"Judicial intervention to stay arbitration on public policy grounds is exceptional and itself limited to circumstances specifically identified or rooted in statute or case law." NY City Dept. of Sanitation v. Macdonald, 87 N.Y.2d 650, 656 (1996). Throughout the briefing in this case, the Carter Parties fail to advance a single authority in this (or any other) jurisdiction invalidating an arbitration clause on public policy grounds under remotely similar equal protection or human rights law claims.

1. New York State Equal Protection Clause Does Not Apply Because Administration of an AAA Arbitration is Not State Action

Equal protection under the New York State Constitution is directed at state action. Lown v. Salvation Army, Inc., 393 F. Supp. 2d 223, 244-45 (S.D.N.Y. 2005) ("Equal protection claims pursuant to Section Eleven are analyzed similarly to federal Equal Protection Clause claims...

[3] The Carter Parties similarly fail to provide evidence that the AAA website statistics are even inaccurate.

Plaintiffs must allege state action"). The Carter Parties argue that "*[t]he courts' role in providing support to, affirming, and vacating arbitration awards under both the Federal Arbitration Act and Article 75 of the CPLR inextricably entangles the AAA with state action, subjecting the AAA to the constitutional limitations on discrimination*" (Br. p. 10, Dkt. 10), a position repeatedly rejected in New York courts and in other courts around the country. See, e.g., Sawtelle v. Waddell & Reed, Inc., 304 A.D.2d 103, 109-110 (1st Dep't 2003) ("there is ample authority for the proposition that a private arbitration does not implicate due process concerns since, where the parties have voluntarily participated in the arbitration process, there is no state action involved, not even in the judicial confirmation"); Zilbershats v. Adler, No. 83-Civ.-307, 1983 U.S. Dist. LEXIS 18982, at *4 (S.D.N.Y. Feb. 25, 1983) ("Arbitration is not a purely public or governmental function. CPLR § 7501, et seq. merely creates a judicial avenue for confirmation or rejection of arbitration awards reached pursuant to written agreements to arbitrate. When a private association agrees to conduct arbitrations that are reviewable under the provisions of CPLR § 7501, et seq., it does not wrest a governmental function from the state."); Davis v. Prudential Sec., 59 F.3d 1186, 1191 (11th Cir. 1995) ("we agree with the numerous courts that have held that the state action element of a due process claim is absent in private arbitration cases."); Fed. Deposit Ins. Corp. v. Air Florida Systems, Inc., 822 F.2d 833, 842, n.9 (9th Cir. 1987) (same).

The AAA arbitrator selection procedures do not constitute state action, as Justice Posner explained in Smith:

> *The American Arbitration Association is a private organization selling a private service to private parties who are under no legal obligation to agree to arbitrate their disputes or, if they decide to use arbitration to resolve disputes, to use the services of the Association, which is not the only provider of such services… The fact that the courts enforce these contracts, just as they enforce other contracts, does not convert the contracts into state or federal action and so bring the equal protection clause into play.*

Smith, 233 F.3d at 507 (emphasis added).

Justice Scarpulla's view expressed at the TRO Hearing followed this reasoning, rejecting the Carter Parties' claim of state action. (TRO Tr. 9:16-10:2 ["*This is a private agreement between two individuals ... it doesn't involve the government.*"], Tr. 9:10 – 10:2, Flanders Affirm. Ex 14)

Therefore, under established and uncontroverted law, the Equal Protection Clause of the New York State Constitution does not apply, and cannot serve to void the MSA arbitration clause.

2. New York State Human Rights Law ("NYSHRL") and New York City Human Rights Law ("NYCHRL") Are Inapplicable Because the AAA is Not a Place of Public Accommodation

The Carter Parties rely on N.Y. Exec § 296(2)(a), NYCRL § 40 and NYC Admin. Code § 8-107, which prohibit discriminatory practices in a "place of public accommodation." But the list of enumerated "public accommodations" under the law does not include private arbitration associations or anything even vaguely similar. N.Y. Exec. Law § 292(9).

The AAA offers "distinctly private" commercial arbitration services which excludes it from being a place of public accommodation. Id. The AAA is an inherently private (not-for-profit) organization. Not every member of the public can access its services, but instead, a private agreement with other private parties to submit the dispute to the AAA is required, along with payment of administrator and arbitrator fees, before services are rendered. See, e.g., Ness v. Pan Am. World Airways, 142 A.D.2d 233, 241 (2d Dep't 1988) (incentive program called "WorldClub was not designed to be used by the general public, nor was the general public solicited to use it. WorldClub is, plain and simple, an incentive program for travel agents, a marketing program, and not a place of public accommodation. It is not a place opened to serve the public."). The National Roster and concomitant candidate lists are only made available to customers who have already met these criteria, and the Carter Parties do not claim discrimination based on the use of any physical space. (Flanders Affirm. Ex. 6)

The Carter Parties neglected to advance through extensive TRO briefing in this case a single authority finding the AAA (or other arbitral body) a place of public accommodation. Not surprisingly, Justice Scarpulla rejected the concept. (TRO Tr. 10:11–10:17, Flanders Affirm. Ex. 14) This Court should reach the same conclusion.

3. The Carter Parties Fail to Meet the Burden of Proving Triggering Conduct

While the Carter Parties assert a general right to be free from racial discrimination under the New York State Constitution and other statutes, no effort is made to substantiate their claim that the complained of conduct is discriminatory. No court has ever held that an arbitration party has an inherent right to have claims adjudicated by someone from the same race. Such a concept, particularly as applied in a commercial dispute, according to the only court which has considered the argument, *"borders on the fantastic."* Smith, 233 F3d at 504 ("No effort to substantiate the suggestion that male judges or arbitrators are prejudiced against wealthy women who have purely commercial disputes with corporations has been made; nor has Smith pointed to any issue in this litigation to which a man might be insensitive. The relief sought, which seems premised on the belief that a female litigant is entitled to be judged by a panel that includes at least one woman, borders on the fantastic.").

Without the benefit of Justice Posner's wisdom at the time, given the two hours' notice the Carter Parties afforded Iconix before presenting in Court (Flanders Affirm. ¶ 29), Justice Scarpulla agreed: *"Now you're dissatisfied because you think that African-American arbitrators are somehow going to decide a commercial dispute differently…. What is that about?"* (TRO Tr. 5:19-5:23, Flanders Affirm. Ex. 14)

The implicit premise behind the Carter Parties' race theory is that an arbitrator who shares the same race as a litigant (indeed, the owner of corporate litigants in this case) is inherently less likely to be biased toward that litigant; while arbitrators of different racial background are prone

to inherent bias. This is a patently false presumption for which no evidence is advanced by the Carter Parties and is based on nothing more than conjecture.

By analogy, the race or ethnicity of a presiding judge is not the basis for recusal. Indeed, a litigant has no say in the demographics of the judicial bench (let alone in a specific case). See, e.g., Blank v. Sullivan & Cromwell, 418 F. Supp. 1, 4 (S.D.N.Y. 1975) ("The assertion, without more, that a judge … who happens to be of the same sex as a plaintiff in a suit alleging sex discrimination on the part of a law firm, is, therefore, so biased that he or she could not hear the case, comes nowhere near the standards required for recusal.").

Mr. Carter has regularly arbitrated in front of non-African American arbitrators without bias objections, including an arbitration in which he prevailed just last year. (Flanders Affirm. ¶¶ 24-27, March 6, 2015 Carbury Email, Ex. 11, Ace of Spades Holdings v. Perfect Privacy Administrative Panel Decision and Arbitrator Bio., Ex. 12 [evidencing multiple instances where Mr. Carter, through counsel, proposed and proceeded to mediation/arbitration under non-African American arbitrators/mediators, including an instance where Mr. Carter prevailed under a non-African American arbitrator])[4]

The Carter Parties do not charge that the AAA has adopted any procedures or practices that target, exclude, or treat arbitrator candidates differently based upon race, or that arbitrators populating the National Roster are systemically excluded from cases. Indeed, no AAA intent or purposeful conduct is alleged. Lown, 393 F. Supp. 2d at 236 ("The absence of allegations that the government defendants engaged in intentional or purposeful discrimination also proves fatal to plaintiffs claim pursuant to the New York Constitution."). To the contrary, the AAA has a host of

[4] Mr. Carter's history of non-objection tips the balance of equities against any injunctive relief. Little India Stores, Inc. v. Singh, 101 A.D.2d 727, 728 (1st Dept. 1984) ("[B]alancing of the equities in favor of the applicant" is a requisite to injunctive relief.").

initiatives (scholarships, selection tools, recruiting, minimum percentage targets), all pre-dating this special proceeding, aimed at *increasing* diversity among its arbitrator roster, receiving honors from the New York Law Journal's Diversity Project the same year the MSA was executed. (Flanders Affirm Ex. 3C [detailing diversity initiatives])

Even if the racial demographics of arbitrators could theoretically form the basis of discrimination, the Carter Parties fail to articulate any objective standard by which that diversity should be measured. According to the U.S. Census Bureau, as of July 1, 2017, the last year such data was published, 13.4% of Americans were African American (with an additional 2.7% identifying as multiracial).[5] (Flanders Affirm. Ex. 17)[6] According to a National Lawyer Population Survey conducted by the American Bar Association in 2017, five-percent (5%) of active and admitted attorneys nationwide identify as African American (an additional 2% as multiracial). Id. at Ex. 34.

When this Petition was filed, the Strike List of arbitrators in the Arbitration included 25% African American, nearly five times the percentage of African American lawyers and almost twice the representation of African Americans in the population at large, according to published statistics. (Strike List and Zaino Lttr, Flanders Affirm. Exs. 3, 10; see also TRO Hearing Tr. 13:2-13:4 [Justice Scarpulla: "If there are---three of the twelve are African American individuals, I don't know where you could possibly go with this."]) No effort is made to articulate how this percentage or the percentage of any future strike list in this Arbitration fails to comport with allegedly mandated diversity standards. Even if the Carter Parties had properly proffered evidence as to a

[5] An additional 2.7% are estimated to have "Two More Races."

[6] New York courts may take judicial notice of public records. Siwek v. Mahoney, 39 N.Y.2d 159, 163 (1976), including statistics published by the U.S. Census Bureau. Affronti v. Crosson, 95 N.Y.2d 713, 720 (2001) (where the Court of Appeals takes judicial notice of census data).

lack of diversity in the arbitration pool, the mere failure to maintain diversity is not discrimination. Smith, 233 F.3d at 508 ("The charge against the AAA is that it failed to maintain gender diversity or balance, but such a failure, while it might conceivably violate an undertaking by the AAA, is not discrimination."). The alleged constitutional and statutory human rights public policy grounds for invalidating the arbitration clauses here fall well short of the substantial burden required for injunctive relief.

POINT IV.

ICONIX IS ENTITLED TO ATTORNEYS' FEES AND COSTS UNDER THE CONTRACTUAL FEE-SHIFTING AGREEMENTS

Where the language of a contract is clear an unambiguous, it must be enforced according to its plain meaning. See Greenfield v. Philles Record, 98 N.Y.2d 562, 569, 780 N.E.2d 166, 170 (2002). The MSA provides, "[i]n the event of arbitration, litigation or other proceeding relating to this agreement, the prevailing party shall be entitled to costs and expenses thereof, including reasonable attorney fees and disbursements." (MSA Art. 9.14, Flanders Affirm. Ex. 1) This action clearly constitutes a "litigation or other proceeding" within the meaning of the MSA.

Separately, Iconix has an independent and specific MSA contractual right to be "reimbursed by Marcy Media and Marcy Holdings, jointly and severally, its fees and costs in compelling delivery of such financial statements." Id. at Art. 8.3. This special proceeding is a procedural effort to thwart an arbitration to compel delivery of these precise financial statements.

Additionally, this Court is in a superior position to assess the attorneys' fees owed by the Carter Parties to Iconix in connection with this proceeding. Block v. Block, 296 A.D.2d 343, 345 (2002) ("appellate court, concededly, has the authority, and is in a better position than a trial court, to assess the extent of the legal services and their reasonable value in connection with the appeal it has heard"); Budin, Reisman & Schwartz, P.C. v. Giamboi, Reiss & Squitieri, 224 A.D.2d 325,

325 (1996) (the IAS court which oversaw the proceedings was "in the best position to determine those factors integral to the fixing of counsel fees").

At the first instance that the Carter Parties' theories were challenged on the merits, the Carter Parties simply folded almost immediately after Iconix was forced to appear on an emergency basis and file extensive briefing on the constitutional and procedural issues implicated in this special proceeding. (SOF ¶¶ 36-37) Rather than admit the loss and dismiss the action in it is entirety, the Carter Parties have insisted on maintaining this proceeding even without maintaining any requests for relief, requiring this additional motion practice. The parties' MSA contractual fee-shifting provisions were specifically intended to avoid such litigation abuses.

Accordingly, Iconix requests that the Court issue an Order directing attorneys' fees and costs to be paid by the Carter Parties to Iconix in connection with this proceeding, and setting a briefing schedule to assess the amount of such fees and costs.[7]

CONCLUSION

For the foregoing reasons, the Court should enter an Order: (i) dismissing the Petition and its claims in their entirety with prejudice; and (ii) awarding attorneys' fees and costs to Iconix in connection with this proceeding under the fee/cost-shifting provisions of the MSA, and in the interests of justice given the lack of cognizable legal theories and supporting authorities, and especially given that the only published authority in the country which addresses the legal theories by the Carter Parties, rejected such theories, legal bases, and relief..

[7] Iconix has maintained contemporaneous billing records that can be submitted in camera for review with a briefing schedule or as otherwise directed by the Court.

Dated: New York, New York
January 11, 2019

BLANK ROME LLP

By: /s/ Samuel D. Levy
Samuel D. Levy
Craig M. Flanders
The Chrysler Building
405 Lexington Avenue
New York, New York 10174
(212) 885-5000
slevy@blankrome.com
cflanders@blankrome.com

Attorneys for Respondents Iconix Brand Group, Inc. and Icon DE Holdings, LLC

Certificate of Word Count

I hereby certify pursuant to 22 NYCRR § 120.70 Rule 17 that the foregoing brief was prepared on a computer using Microsoft Word. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 6,599.

Dated: New York, New York
January 11, 2019

BLANK ROME LLP

By: /s/ Samuel D. Levy
Samuel D. Levy
Craig M. Flanders
The Chrysler Building
405 Lexington Avenue
New York, New York 10174
(212) 885-5000
slevy@blankrome.com
cflanders@blankrome.com

Attorneys for Respondents Iconix Brand Group, Inc. and Icon DE Holdings, LLC